Date: February 6, 1997

Case No.: 95-INA-00318

In the Matter of:

CROMWELL GROWERS, INC.,
Employer

On Behalf Of:

KRZYSZTOF CYBULSKI,
Alien

Appearance: Keith W. Acker, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that

the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 30, 1993, Cromwell Growers, Inc. ("Employer"), filed an application for labor certification to enable Krzysztof Cybulski ("Alien") to fill the position of Head Grower (AF 74-75). The job duties for the position are:

> Supervise workforce of 25 in propagation, growing, fertilizing, shipping of bulbs, bedding plants, potted plants and holiday plants: Supervise application (and instruct others in application) of pesticides, insecticides, herbacides [sic] and fungicides; use greenhouse software system (AMI 3,000 Volmatic, Honeywell for heat and air, and Wadsworth); attend trade shows and stay abreast of new technology and research; select products for shipment; continue customer contact; communicate with Polish-speaking and Russian-speaking workforce.

The requirements for the position are a Bachelor of Science Degree with a major of Horticulture and two years of experience in the job offered or as a Grower, of which six months must be in a supervisory position (AF 74, 57). Other Special Requirements are:

> License from State of Connecticut for insecticides, herbacides [sic], and fungicides. Ability to communicate with workers in Polish and Russian. Knowledge of AMI 3,000 Volmatic, Honeywell, and Wadsworth software for Greenhouses or equivalent Greenhouse software.

The CO issued a Notice of Findings on October 17, 1994 (AF 27-30), proposing to deny certification because the Employer is requiring that applicants be able to communicate in Polish and Russian in violation of § 656.21(b)(i)(c). Additionally, the CO stated that the Employer's minimum requirements appear to be unduly restrictive, tailored to meet the Alien's qualifications and background, and preclude the referral of otherwise qualified U.S. workers, in violation of § 656.21(b)(2) and (6). The CO further stated that the Employer rejected a qualified U.S. applicant for other than lawful, job-related reasons in violation of § 656.21(b)(7) (now recodified as § 656.21(b)(6)).

Accordingly, the Employer was notified that it had until November 21, 1994, to rebut the findings or to cure the defects noted.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Under cover letter dated November 16, 1994, Counsel for the Employer filed the Employer's rebuttal dated November 10, 1994, with attachments (AF 7-26). The Employer contended that the language requirement is based upon clear business necessity. The Employer stated that the requirement of knowledge of the Russian language has been deleted, leaving only the requirement for a knowledge of the Polish language. The Employer stated that the Alien is in charge of mostly Polish-speaking employees. The Employer also stated that some of its employees are non-English speaking Mexican workers, for whom the Employer hires a bilingual, Spanish-speaking grower to direct them. Regarding U.S. applicant Kaftan, the Employer contended that it tried to contact her by telephone and by letter, even though the Employer did not believe she was qualified for the offered position, but she never responded. Lastly, the Employer offered to readvertise the position.

The CO issued the Final Determination on December 27, 1994 (AF 5-6), denying certification because the Employer has failed to document that the Polish/Russian language requirement arises from business necessity; therefore, the job opportunity has not been described without unduly restrictive requirements.

On January 30, 1995, the Employer requested review of the Denial of Labor Certification (AF 1-4). On February 15, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On February 28, 1995, the Employer filed a Motion to Remand, and on March 16, 1995, a Notice was issued advising the Employer that its Motion to Remand would be considered by a panel of Administrative Law Judges. Thereafter, on March 21, 1995, the Employer submitted a Brief.

Discussion

Section 656.21(b)(2)(i)(C) provides that the job opportunity shall not include a requirement for a language other than English unless that requirement is adequately documented as arising from business necessity. The Employer was informed that it must document that the job requirement: (1) bears a reasonable relationship to the occupation in the context of the employer's business; and, (2) is essential to perform the job in a reasonable manner. See *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc)*; § 656.21(b)(2)(i).

As applied to foreign language requirements, the first prong of the *Information Industries* standard requires the Employer to establish that a significant percentage of its business includes clients, co-workers, or contractors who speak the foreign language at issue. *Raul Garcia, M.D.*, 89-INA-211 (Feb. 4, 1991); *Felician College*, 87-INA-553 (May 12, 1989) (*en banc)*. The law is not absolute on what percentage constitutes a significant percentage of business. We have held that one business that is dependent on a 20 to 30 percent use of Farsi has a significant percentage of its business at stake. *Mr. Isak Sakai*, 90-INA-330 (Oct. 31, 1991). Other cases have indicated that a foreign language clientele of 23 percent is not significant. See *Washington International Consulting Group*, 87-INA-625 (June 3, 1988). The second prong of the test requires that the Employer establish that the use of the foreign language is essential for the company to carry out the job duties in a reasonable manner. (February 4, 1991); *Splashware Company*, 90-INA-38 (November 26, 1990). Documentary evidence supporting the required evidentiary showings must be furnished. *Id.*

The issue in this case is whether the Employer has met its burden of establishing the business necessity of its foreign language requirement. In support of its contention, the Employer's rebuttal included the following statement: "the job is complicated enough and hazardous enough to require accurate and detailed communication and the need for Polish language skills is more or less constant throughout the day." (AF 9-10). The Employer created a chart and provided payroll lists allegedly showing the number of Polish-speaking workers (AF 11-23). The Employer also put a mark beside the name of each employee who cannot adequately communicate in English. Finally, the Employer provided an article illustrating the government regulations that must be communicated to his employees (AF 25-26).

The facts in this case are similar to the facts in *Pacific Southwest Landscape,* 94-INA-483 (April 11, 1996). In that case, the Employer documented the business necessity of the foreign language requirement by providing a list of employees with Hispanic surnames. The CO ultimately found that this was not sufficient to establish business necessity. *Id.* Similarly, we find that the chart and payroll sheets provided by the Employer in this case do not establish the business necessity of the foreign language requirement. The only evidence available regarding which employees are unable to communicate in English is a mark put beside the employees' names by the Employer. At the most, this evidence establishes that there are employees with Polish names.

Although a written assertion constitutes documentation that must be considered under *Gencorp,* 87-INA-659 (Jan. 13, 1988) (*en banc)*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Furthermore, a finding of business necessity cannot be based on unsupported assertions made by the employer. *Lamplighter Travel Tours*, 90-INA-64 (Sept. 10, 1991). In addition, the list of individuals with Polish names is insufficient to prove that the employees cannot communicate in English and that Polish is essential to the conduct of Employer's business.[2] We do not question the importance of communicating government regulations to employees, however, the Employer has failed to provide the necessary documentation to satisfy the *Information Industries* test.[3] Accordingly, the CO's denial of certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

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[2] In the Request for Review the Employer stated that "there are no documents that could have been sent, except for those that were sent . . .." We disagree. The Employer could have established business necessity by submitting affidavits from his employees stating that they cannot communicate in English.

[3] In its Brief on Appeal, the Employer argues that "the vagueness and ambiguity of the NOF made it very difficult for employer to know how to respond." We agree with the Employer that the CO incorrectly asked for letters of correspondence from clientele requiring translation. However, we find that the Employer was provided sufficient notice of what is necessary to establish business necessity of the foreign language requirement, including the specific elements of the *Information Industries* test. This is evident by the fact that the Employer attempted to rebut the proper issue. Therefore, we find the CO's error harmless. See *Anderson-Mraz Design*, 90-INA-142 (May 30, 1991).

Entered this the _____ day of February, 1997, for the Panel.

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.